

GLENN H. JOHNSON
WESTERN COAL CO.

IBLA 80-863

Decided February 24, 1983

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting coal lease applications M 2542 and M 32133.

Set aside and remanded.

1. Coal Leases and Permits: Applications -- Coal Leases and Permits:
Leases

Where emergency leasing regulations have been amended after BLM adjudicated an application to lease coal lands competitively, BLM on remand should apply the amended regulations to the applications at issue.

APPEARANCES: Glenn H. Johnson, Roundup, Montana, pro se; Anthony J. Thompson, Washington, D.C., for Teton Exploration Drilling, Inc.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Glenn H. Johnson, general manager of Western Coal Mining Company, appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated July 29, 1980, rejecting coal lease applications M 2542 and M 32133. This action by the State Office followed a decision of this Board, Glenn H. Johnson (On Reconsideration), 44 IBLA 247 (1979), remanding these applications to BLM for further consideration in light of newly issued regulations at 43 CFR Part 3400, 44 FR 42609 (July 19, 1979).

On remand, BLM applied 43 CFR 3425.1-4 (1979) and rejected each of appellant's applications. While we believe that the conclusion reached by BLM was correct in each case, its reasoning was sketchy at best. Though much could be written to clarify the basis for BLM's action, new regulations applicable to the instant applications have been issued during the pendency of this appeal. These new regulations, effective August 30, 1982, provide new criteria for emergency lease sales. See 43 CFR 3425.1-4, 47 FR 33141 and 47 FR 33124-25 (July 30, 1982). BLM's decision of July 29, 1980, is, accordingly, set aside and the case file remanded for consideration of the above applications in light of these new regulations.

In his statement of reasons on appeal, appellant objected to our earlier remand of this case wherein we specified that newly issued (1979) regulations must be applied by BLM to appellant's applications. Glenn H. Johnson (On Reconsideration), *supra*. Appellant's applications were filed in 1973 (M 2542) and 1975 (M 32133). If applications M 2542 and M 32133 had been adjudicated by BLM applying short-term criteria in effect prior to the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 30 U.S.C. § 181 (1976), counsel maintains, the applications would have satisfied these criteria. Counsel argues that the Department's delay in acting on these applications was in part caused by its loss of the case file for 2 years.

Because we once again remand the case files for adjudication in the light of new regulations, 43 CFR 3425.1-4, effective August 30, 1982, it is appropriate to address counsel's argument that Johnson had vested rights that can not be defeated by the Department's retroactive application of new regulations.

The earliest communication from appellant to BLM in file M 2542 is a letter dated December 27, 1973, wherein appellant refers to his application for coal lease M 2542 and describes his plans for mining. Appellant sought to lease the subject lands 1/ because the production from his existing acreage, including Federal lease B 028531, which was contiguous to M 2542, was insufficient to meet the costs of compliance with the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 (1976). 2/ No application appears in the file. Nevertheless, the State Office began to process "application" M 2542 and recommended to the Director, BLM, by letter of August 22, 1974, that a competitive coal lease sale take place for 120 of the 160 acres set forth therein. BLM procedures called for sealed bids to be submitted for the lands at issue and upon receipt of bids meeting the recommended minimum acceptable bid, an oral auction would be held for the lease.

From these few facts, it thus appears that Johnson had nominated the subject lands for a coal lease sale and was prepared to bid for the lease. Prior to FCLAA, sale by competitive bidding was one of two methods set forth in 30 U.S.C. § 201 (1970) for the leasing of coal lands; the other method called for a prospective lessee to obtain a prospecting permit and to show that the land contained coal in commercial quantities. If such a showing was made, the permit holder would be entitled to a preference right lease.

In early 1973, the Secretary announced that no coal leases would be issued except pursuant to short-term criteria announced on February 17, 1973. Leasing was permitted under these criteria when coal was needed to maintain an existing operation or when coal was needed as a reserve for production in the near future, *inter alia*. Sierra Club v. Morton, 514 F.2d 856, 865 (D.C. Cir. 1975). By letter of May 14, 1976, the State Director wrote to the Director, BLM, that appellant's application met the short-term criteria in effect when

1/ Appellant seeks 160 acres in NE 1/4 SW 1/4, N 1/2 SE 1/4, and SE 1/4 SE 1/4 sec. 4, T. 7 N., R. 26 E., Principal meridian, Musselshell County, Montana.

2/ This Act was redesignated the Federal Mine Safety and Health Act of 1977 by P.L. 95-164 (Nov. 9, 1977), 91 Stat. 1290.

the case file was forwarded to Washington, D.C., in 1974. A handwritten note in the case file, dated August 1976, acknowledges that case file M 2542 was lost by the Director's office. In that same month, the Director, BLM, instructed all State Directors to suspend all actions in proposed competitive coal lease sales in view of FCLAA's enactment on August 14, 1976.

On August 18, 1975, Johnson filed application M 32133 for approximately 3,560 acres nearby. Following this application, he began to reconsider his earlier plan to strip mine the lands in M 2542 and instead sought the consolidation of lands in M 2542 and M 32133 for an underground mine. By May 31, 1977, an Environmental Analysis (EA) had been completed for M 2542 and a draft EA for M 32133.

By letter of September 14, 1977, the State Director informed Johnson that revised short-term criteria and the possible need for an Environmental Impact Statement jeopardized any lease sales in the near future. Thereafter on November 3, 1978, appellant's applications were rejected by BLM. The decision was based on the order set forth in Natural Resources Defense Council (NRDC) v. Hughes, 437 F. Supp. 981 (D.D.C. Sept. 27, 1977), and modified at 454 F. Supp. 148 (D.D.C. June 14, 1978), enjoining the Department from issuing a lease other than to maintain an existing operation. ^{3/} In Glenn H. Johnson (On Reconsideration), *supra*, this Board held that the district court's injunction had expired upon the Secretary's review and implementation of a new Federal coal management program. As a result, BLM was instructed to apply newly revised (1979) regulations to Johnson's applications.

Counsel maintains that two recent district court decisions support his argument that appellant had vested rights that could not be defeated by the Department's application of revised regulations. In Peabody Coal Co. v. Andrus, 477 F. Supp. 120 (D. Wyo. 1979), the court held that an applicant for a 2-year extension of its prospecting permit had a valid existing right in the prospecting permit. As such, the provisions of FCLAA repealing section 2(b) of the Mineral Leasing Act ^{4/} subject to valid existing rights could not defeat the extension application. The court found that the record disclosed inexcusable agency delay in adjudicating the extension application and that Peabody Coal had expended time and money in complying with the terms of the permit.

In Peterson v. Department of the Interior, 510 F. Supp. 777 (D. Utah 1981), the court held that where an applicant for extension of a prospecting permit had satisfied statutory and regulatory requirements for such extension and had expended substantial time and money to develop the permit, the application and permit are valid existing rights. Prior to FCLAA, the court noted, agency practice had been to grant an extension request upon the applicant's compliance with applicable statutes and regulations and upon the recommendation of Geological Survey.

^{3/} In August 1978, Johnson's coal mining operation and lease rights were acquired by Teton Exploration Drilling, Inc.

^{4/} Section 2(b) authorizes the Secretary to grant prospecting permits for a period of 2 years. If the permittee shows that the lands under permit contain coal in commercial quantities, the permittee shall be entitled to a lease. 30 U.S.C. § 201 (1970).

Counsel maintains that Peabody Coal and Peterson are persuasive because each case involved administrative delay, the expenditure of assets by the applicant, and the exercise of discretion by the Department. What counsel overlooks, however, is that Peabody Coal and Peterson also involved prospecting permits held by the applicants. As such, the applicants in those cases undertook their extension requests having already received the right to prospect on and explore Federal lands for coal. Those rights were conferred upon the applicants by the Secretary pursuant to 30 U.S.C. § 201 (1970). Furthermore, the expenditures of those applicants were directed to determining the existence or workability of coal in the lands.

Appellant, on the other hand, filed his applications with no more right to the lands in M 2542 or M 32133 than any other citizen. His expenditures were not directed to finding coal; coal was already known to exist. Though appellant should not have suffered part of the delay that he has in adjudicating his requests, delay by itself does not confer valid existing rights. Peterson v. Department of the Interior, supra at 783.

In Peabody Coal, supra at 124, the court observed that "there can be no doubt that the status of a prospecting permit is superior to that of a mere application for a permit." Indeed, in American Nuclear Co. v. Andrus, 434 F. Supp. 1035 (D. Wyo. 1977), the court held that no valid existing rights were created until at least a prospecting permit had been issued. Id. at 1037. Appellant had no valid existing rights that would prevent BLM from applying regulations revised after FCLAA.

Accordingly, BLM is directed to apply current regulations in readjudicating applications M 2542 and M 32133. If appellant seeks the modification of its existing lease B 028531, it should apply for same.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case remanded.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

